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THE NORTHERN PACIFIC RAILWAY COMPANY,

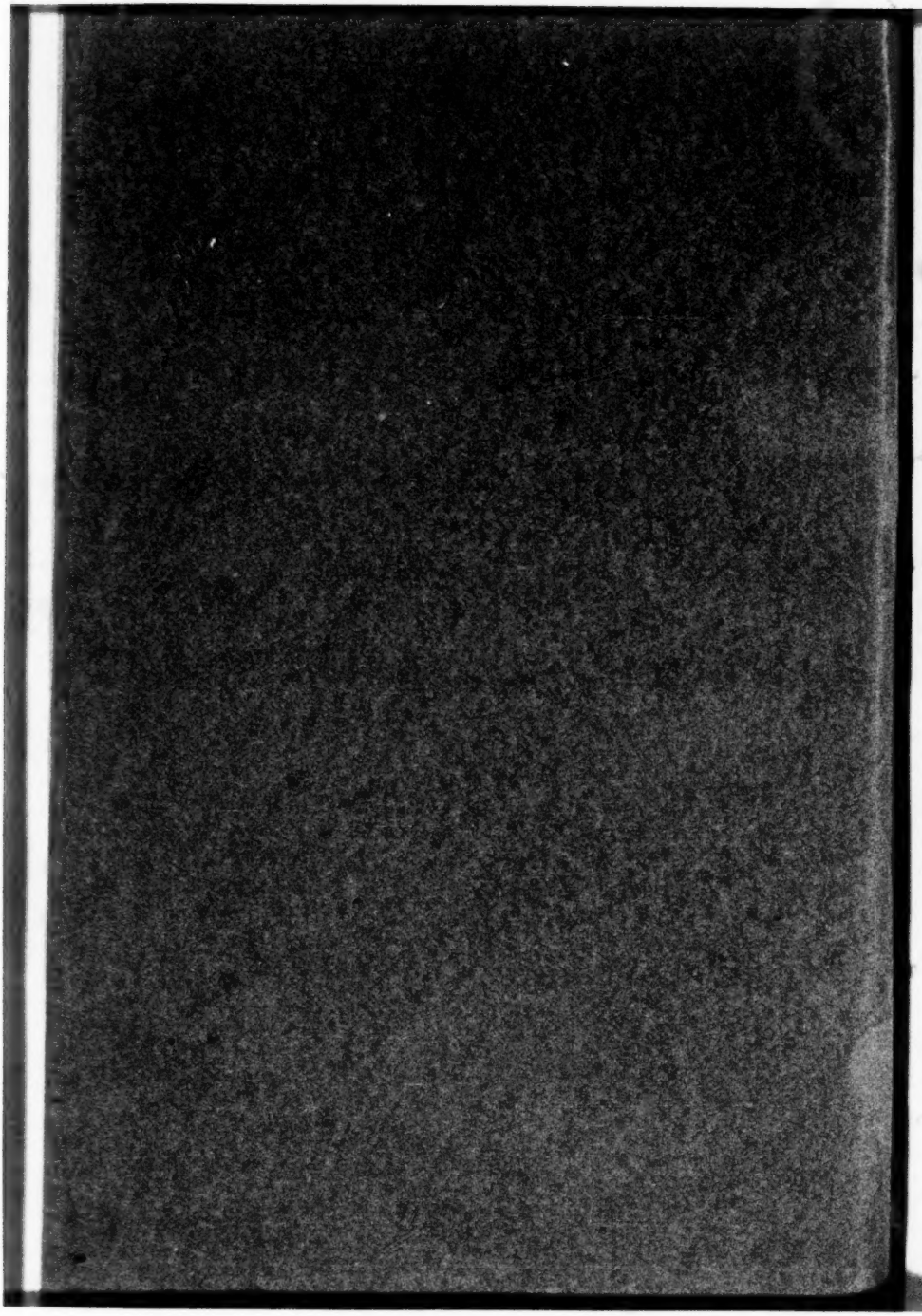
[redacted]

In Error to the Supreme Court of the State of Washington.

Brief of Plaintiff in Error.

[redacted]

CROSWELL & FOLEY and
M. B. BRIGHT,
Attorneys for Plaintiff in Error.



(16,965)

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1899.

No. 121.

ANDREW DOHERTY,

Plaintiff in Error.

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

Brief of Plaintiff in Error.

CROWNHART & FOLEY AND
M. S. BRIGHT,
Attorneys for Plaintiff in Error.

STATEMENT.

This proceeding was instituted in the Superior Court of Douglas County, Wisconsin, by the filing of the petition of Andrew Doherty, the plaintiff in error, which alleged that he was the owner in fee of the north-half of the south-west quarter of section four, township forty-seven north, range eleven west, in Douglas County, Wisconsin.

The petition further alleged that in the year 1883 the Northern Pacific Railroad Company entered upon the land of the petitioner, constructed across said land its railroad, and continued to occupy the portion so appropriated for railroad purposes until August 31, 1896, when said railroad was sold and transferred to the defendant in error the Northern Pacific Railway Company, which last named company thereafter occupied the premises so taken.

The petition further alleged that neither company had acquired title to the premises so taken, and that no proceeding had been instituted by either company to acquire title by purchase, eminent domain or otherwise. It was prayed that petitioner be adjudged to be the owner of the land so taken, and that commissioners be appointed to assess his damages.

To this petition the Northern Pacific Railway Company interposed an answer asserting title to the premises in controversy in itself by virtue of a grant by act

of congress of July 2, 1864, to the Northern Pacific Railroad Company, and a purchase of the interest of the last named company.

Upon the pleadings the sole issue between the parties was that of title, and it was conceded that this question depended on the location of the eastern terminus of the Northern Pacific Railway Company under the act of Congress of July 2, 1864. The Northern Pacific Railroad Company claims that the eastern terminus or point of beginning was established at the City of Ashland, on Lake Superior, and that the right of way over the land in question was granted by Congress, while the plaintiff in error claims that the eastern terminus of the road under the act of Congress was fixed at Duluth, or if not at Duluth, then at Superior, and that the Northern Pacific Railroad Company constructed that portion of its main line east of those points without authority under its charter.

The trial court determined this question in favor of the plaintiff in error, and upon appeal to the Supreme Court of the State of Wisconsin, the order of the lower court was reversed with directions to dismiss the petition of plaintiff in error. To reverse such decree of the Supreme Court this cause is brought to the United States Supreme Court on writ of error.

The trial was had upon an agreed statement of facts which is incorporated in the bill of exceptions, and from which the following facts appear:

On November 8, 1882, the petitioner, Andrew Doherty, filed his application in the proper United

States District Land Office to make homestead entry of the north half (N. ½) of the southwest (S. W. ¼) of section four (4), township forty-seven (47), range eleven (11), which includes the land in controversy, and on the same day his application was allowed.

Thereafter, having complied in all respects with the laws relating to homesteads, and on February 6, 189-, the patent of the United States was issued to him purporting to convey the land so entered.

The title of the Northern Pacific Railroad Company, under which the appellant company claims, was asserted under an act of congress approved July 2, 1864, entitled: "An act granting lands to aid in the construction of a railraad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route," which is set out at length in the bill of exceptions.

Transcript of Record, pp. 26 to 35.

It is provided by the first section of this act as follows:

"And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin: thence westerly by the most eligible route as shall be determined by said company, within the territory of the United States, on a line north of the forty-

fifth degree of latitude, to some point on Puget's Sound. * * *"

And it is provided by Section 2:

"And be it further enacted that the right of way through the public lands be and the same is hereby granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed. * * *"

By Section 3 of the act of July 2, 1864, lands were granted to aid in the construction of the proposed railroad to the amount of ten alternate sections per mile on each side of the line within the states, and twenty alternate sections in the territories, with a right of indemnity for lands excepted from the grant within ten miles of the limits of such alternate sections.

By the joint resolution of congress of May 31, 1870, a further indemnity belt ten miles in width, on each side of the line, was created, from which the company was entitled to satisfy losses occurring after the date of the grant which could not be satisfied within the first indemnity limits of the state or territory wherein they occurred.

Transcript of Record, p. 35.

The act required an acceptance of its terms by the company within two years from its approval, and this was done December 29, 1864.

Transcript of Record, p. 35.

Section 18 of the granting act required the company to obtain the consent of the legislatures of the several states through which the road should pass previous to commencing the construction thereof, and in the year 1865 the legislatures of Minnesota and Wisconsin gave such consent.

Transcript of Record, pp. 37-38.

The act passed by the Minnesota legislature is in part as follows:

Sec. 1. That the consent of the state be and the same is hereby given to the said Northern Pacific Railroad company to survey, lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances within its limits, on the line in said act of congress authorized; and for the purposes aforesaid in said act of congress set forth, and in order to carry the same to full effect, the said Northern Pacific Railroad Company, its successors and assigns, are hereby vested with all the rights, powers, privileges and immunities, within the limits of this state, which are by said act of congress conferred upon them within the territories and jurisdiction of the United States, subject to the conditions in said act contained, and the following proviso:

"Provided, that should the said company elect to make the eastern terminus of said road east of the eastern boundary of the State of Minnesota, then, and in that case, they shall construct, or cause to be con-

structed, a line of railroad from the said main line to the navigable waters of Lake Superior, within the State of Minnesota, of the same gauge as said main line, for which purpose the same powers, rights and privileges are hereby granted to said company as they have or may have to construct said main line within the State of Minnesota; and provided, further, that nothing in this act contained shall be construed as exempting the roadbed and other property of said company within this state from taxation."

Sec. 3 of the act of July 2, 1864, which authorized the building of the Northern Pacific Railroad and made the land grant, contained the following provisions:

"That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount of land granted by this act:

"Provided, further, thatthe railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company or may consolidate, confederate and associate with said company upon the terms named in the first section of this act."

By the act of May 5, 1864, (13 Stat. 64,) Congress had granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad from St. Paul to the head of Lake Superior, five alternate sections per mile on each side of that railroad. The State of Minnesota transferred this grant to the Lake Superior & Mis-

issippi Railroad Company, and that company constructed the railroad from St. Paul to Duluth by way of Thompson, where the Northern Pacific Railroad subsequently crossed it. On May 5, 1864, Congress granted to the State of Wisconsin to aid in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, to Bayfield, and thence to Superior, every alternate section of land for 10 sections in width on each side of the railroad. 13 Stat. 67. This grant was transferred by the State of Wisconsin to the Portage, Winnebago & Superior Railroad Company which filed its map of definite location on November 10, 1869, and thereupon the lands within the limits of the grant were withdrawn from settlement and entry, and so remained until after the Northern Pacific Railroad Company filed its map of definite location of July 6, 1882. That portion of this railroad from Bayfield to Superior never was built, but it was on the same general route as a portion of the road of the Northern Pacific Railroad Company from Thompson to Ashland.

The actual building of the Northern Pacific Railroad was commenced in the year 1870, at Thompson Junction, on the line of the Lake Superior & Mississippi Railroad, in the State of Minnesota, and said road built westward therefrom.

On the 1st day of January, 1872, the Lake Superior and Mississippi Railroad Company deeded to the Northern Pacific Railroad Company an undivided half interest in all of its property from Thompson Junction

to Duluth for the sum of five hundred thousand dollars. (Transcript of record p. 58.)

On the same day, the Lake Superior and Mississippi Railroad Company and the Northern Pacific Railroad Company entered into an agreement for the joint management and control by the two companies of the road jointly owned by them from Thompson Junction to Duluth. (Transcript of record p. 64.)

On May 1st, 1872, the Northern Pacific Railroad Company leased from the Lake Superior and Mississippi Railroad Company the entire line of the latter road for a period of 999 years. (Transcript of Record p. 71.)

On the 21st day of April, 1874, the two companies entered into an agreement in writing by which the lease of the entire line of the Lake Superior and Mississippi Railroad to the Northern Pacific Railroad Company above referred to was annulled. (Transcript of record p. 89.)

In 1872 the line of road had been located and built from western Dakota as far as Thompson, in the State of Minnesota, a place on the Lake Superior and Mississippi railroad, about twenty-six miles from Duluth. For ten years no more building was done at the eastern end of the line. In 1882 the road was constructed from Thompson to the City of Superior, at the eastern extremity of Lake Superior, viz: on the the Bay of Superior. Two years later it was built across petitioner's land, and a short time thereafter in 1884, was built to Ashland, Wisconsin.

By the eighth section of the granting act, it was

provided as one of the conditions of the grant, that the whole road should be completed by July 4, 1876. This limitation was extended for a period of two years by an Act of Congress, May 7, 1866. (14, Stat. 355.)

ASSIGNMENTS OF ERROR.

I.

The court erred in its judgment that the petition of plaintiff in error be dismissed.

II.

The court erred in its judgment, wherein and whereby it decided that the plaintiff in error was not the owner of the land in controversy, and was not entitled to receive compensation for the taking thereof by the defendant in error.

III.

The court erred in its judgment, wherein and whereby it decided that the patent of the United States issued to the plaintiff in error upon his homestead entry under Section 2289 of the Revised Statutes of the United States did not convey to the plaintiff in error the land in controversy.

IV.

The court erred in its judgment, wherein and whereby it held that the defendant in error had a right

to use and occupy the land in controversy under the act of Congress of July 2nd, 1864, paramount to the right of the plaintiff in error under his said patent.

ARGUMENT.

The plaintiff in error contends:

First: That the eastern terminus of the Northern Pacific Railroad Company was fixed at Duluth, Minnesota, by virtue of a consolidation with the Lake Superior & Mississippi Railroad Company in 1872.

Second: That if the terminus was not fixed at Duluth by reason of such consolidation, then such terminus was fixed at Superior, Wisconsin, by the act of the Northern Pacific Railroad Company, in locating and building its line of road to said place in 1882.

We will consider the propositions in the order stated.

By the granting act to the Pacific Railroad Company, two ways were provided in which a line of railway might be secured from "a point on Lake Superior to some point on Puget Sound," viz. (1) the Northern Pacific Railroad Company might construct its own road upon the entire line. (2) If said route should be found upon the line of another and prior land grant railroad route, as far as the two routes were upon the same general line (that is as far as the general line or

route selected was common to both roads) the company receiving the previous grant might assign its interest to the Northern Pacific Railroad Company, or might "consolidate, confederate and associate" with such company for the construction and operation of the road along such common route. Westward from Thompson's Junction in Minnesota, the Northern Pacific constructed its own line. The question now is, was the arrangement effected between said company and the agreement set forth in the record, especially the agreement and contract of purchase of January 1st, 1872, such a consolidation, confederation or association of the two roads as was contemplated by the granting act to the Northern Pacific Railroad Company? If it was, then Duluth must be the eastern terminus of the road as it is on Lake Superior and the road was to be built to but one point on the lake. We will discuss fully this last statement under the second head.

Let us see what are the facts as to the consolidation: On November 30th, 1871, the Northern Pacific Railroad Company filed its first map of definite location. The road as located by that map started at the point of its junction with the Lake Superior & Mississippi Railroad at Thompson, and extended westward to the Red River of the North, at Fargo, North Dakota.

By act of May 5th, 1864, (13 Stat. 64) Congress had made a land grant to the State of Minnesota, for the purpose of aiding in the construction of a railroad in said state from the City of St. Paul to the Head of Lake Superior. The Lake Superior & Mississippi

Railroad Company became the grantee of the State of Minnesota under that act and had constructed the road in aid of which the grant was made prior to the time of the filing by the Northern Pacific Railroad Company of its said map of definite location. Before this, however, and on March 6th, 18 5, the so-called "Perham Map" was filed by the president of the Northern Pacific Railroad Company. On the map was designated the general route of the whole line of road from Lake Superior to Puget Sound and showing the head of the lake, Duluth or Superior, as the starting or initial point.

Whether this filing was authorized or not, this much is to be seen by said map: If Duluth were to be made the initial point of the road, then from Duluth westward to Thompson in Minnesota the routes of the Lake Superior & Mississippi Railroad and the Northern Pacific Railroad were on the same general line.

Such was the situation then up to January 1st, 1872, when the Lake Superior & Mississippi Railroad Company sold to the Northern Pacific Railroad Company, a one-half interest in, and the right to jointly use and operate that portion of the former company's main line between Thompson's Junction in Minnesota and the City of Duluth on Lake Superior in said state. The consideration for the sale was the sum of $500,000, which was to be paid by the said Northern Pacific Railroad Company on the 1st of January, 1896, if the premises on that date should be unencumbered of certain existing mortgages, or as soon thereafter as they should become free from said mortgages. And until

said sum of $500,000 should become due and payable, the said Northern Pacific Railroad Company was to pay semi-annually the sum of $17,500 to be applied to the payment of interest on certain mortgage bonds of the Lake Superior & Mississippi Company and certain taxes against the same. Provision was made for the joint occupation, use and operation of the road by both companies; and at the same time a deed was made and executed by the Lake Superior & Mississippi Company conveying to the Northern Pacific Railroad Company an undivided one-half interest in all that portion of the said grantor's said main line of railway between Thompson's Junction and Duluth, on Lake Superior, and all and singular the appurtenances thereunto belonging, in accordance with the terms of said agreement.

By the arrangement, the Northern Pacific Railroad Company was enabled to connect and did connect its road with Lake Superior, at Duluth, Minnesota, from Thompson's Junction, in said state, a distance of 26 miles, over the line of a railroad to aid in the construction of which, lands had been previously granted by the United States (13 Stat. 64). In determining what was the purpose of making said arrangements and agreements with the said Lake Superior & Mississippi Railroad Company, some very suggestive language is to be found in the agreement for the purchase of one-half interest in said company's road made January 1st, 187?, executed by the president and secretary of the Northern Pacific Railroad Company. The language is found on

page 103, 104 of Transcript of Record and is in part as follows:

"The party of the first part is the owner of a certain line of railroad, known as the Lake Superior & Mississippi Railroad, which extends from the City of St. Paul in the State of Minnesota to the City of Duluth, in the same state, and which, entering the city of Duluth runs to a grain elevator erected upon a dock on the margin of the Waters of Lake Superior, including a passenger and freight depot and numerous side tracks within the city.

"And, whereas, the said party of the second part (Northern Pacific Railroad Company) is duly authorized by law to construct, or to acquire, and to maintain and operate a certain railroad which *if constructed as an independent line, would run into and through Duluth aforesaid, and to the waters of Lake Superior aforesaid, and to terminate at a point adjacent to the terminus of the said Lake Superior & Mississippi Railroad.*

"And, whereas, the railroad of the said party of the second part, commonly known as the Northern Pacific Railroad, as the same is now located and constructed, connects with the said Lake Superior & Mississippi Railroad near the Town Thompson, in Carleton County, in the said state of Minnesota, but has not been constructed into the said City of Duluth; and the said party of the second part has heretofore by agreement with the said party of the first, done its transportation between the said point of connection of said roads and

the water of Lake Superior, over and by the way of the said Lake Superior & Mississippi Railroad.

"And whereas, the said party of the second part, being desirous of permanently securing the right to use the portion of said railroad, which extends from the said points of connection of said roads, into Duluth. as aforesaid, *to the end that the necessity for construction of the said Northern Pacific Railway from the said point of connection to the said city of Duluth may be obviated* has agreed to purchase an undivided one-half interest in such portion of the said Lake Superior & Mississippi Railroad for the price or sum, etc., and the said party of the first part has agreed to sell and convey the same to the said party of the second part, and to grant certain easements and rights of way over and in connection therewith."

And again, in the agreement between the same parties made May 1st, 1872, the following language is found on page 77 of Transcript of Record: "And whereas, "it is believed by the parties hereto to be for their mu- "tual interest that the said Northern Pacific Railroad "and the said Lake Superior & Mississippi Railroad "should be operated under one and the same manage- "ment and control."

Now, from the facts it would appear, as found by the Secretary of the Interior (23 L. D. 210.)

(1). That the routes of the two roads were found to be upon the same general line between Thompson's Junction and Lake Superior.

(2). That by said agreement and contract of purchase, the Northern Pacific Company became the abso-

lute owner of the one-half interest of the main line of railroad between these two points, which had been constructed by the Lake Superior & Mississippi Company under a previous congressional land grant.

(3). That by said agreement, running arrangements were formed and entered into, and the two companies became associated together in the ownership, use and operation of said main line railroad between said points.

(4). That the Northern Pacific Company thus effected the connection of its own constructed road with Lake Superior, the eastern terminal limit of its grant.

(5). And, that said company continued thus for nearly fourteen years (and the arrangement still continues) and until after the time limited by the grant for the completion of its road had elapsed, to use and operate the line of road it had thus acquired, in all respects as though it were a part of its own main line of road from Lake Superior to Puget Sound, required to be constructed by its grant.

"In view of these facts it is difficult to arrive at any other conclusion than that the said arrangement was a consolidation, confederation and association of the two roads, such as it was the intention of Congress to provide for. The circumstances which led up to the contract of association and the results accomplished by it, seem to have been, in all respects, just such as were contemplated by Congress, when it adopted the said two provisos. The routes of the two land grant roads were found to be upon the same general line between the

points named, and by means of the said association and confederation the two railroad companies were enabled, together to aid, and did aid, to that extent, in the accomplishment of the object of the grant, namely, the construction of a "continuous railroad" from Lake Superior to Puget's Sound." (23 L. D. 210, 211.)

The Northern Pacific Railroad Company had no power or authority to enter in any such arrangement with another road, except such power as is conferred by its granting act. It is contended that such power is given by act of the Minnesota Legislature of March 2, 1865,(Transcript of Record p.37) which act provided that in case said Northern Pacific Company should elect to make the eastern termination of its road east of the State of Minnesota the said company "shall construct or cause to be constructed, a line of railroad from the said main line to the navigable waters of Lake Superior, within the State of Minnesota."

Certainly the legislature did not intend by this, that in case the Northern Pacific Company located its eastern terminus in Wisconsin, that such provision or condition might be complied with by merely entering into some running arrangement with some road to the lake, whose line was crossed by the Northern Pacific Company, and it is equally clear that the grant of power to "construct or cause to be constructed" a line of railway to the waters of Lake Superior does not contain or carry with it or imply power to consolidate with some line already in operation.

Pearsall vs. Great Northern Ry., 161 U. S., 664.

The powers of corporations organized under legislative statutes are only such as those statutes confer.

Thomas vs. Railroad Co., 101 U. S., 71-82.

Power to consolidate is not implied, but must be expressly given in the charter.

2 Morawetz, Sec. 941-1.
Cook on Stock and Stockholders, Sec. 668.

In this case, the granting act authorized the Northern Pacific Company to "consolidate, confederate and associate" with any other and prior land grant road so far as the routes of the two roads were found to be on the same general line, upon the terms named in the first section, that is, for the construction of a "continuous railroad," from Lake Superior to Puget's Sound; and no authority was given for such consolidation, confederation or association upon any other terms.

Thompson vs. Railroad Co., 101 U. S., 71.

It would seem then, that the Northern Pacific Railroad Company had no power or authority to effect the arrangement it did effect with the Lake Superior & Mississippi Company,— whether it be called a consolidation, confederation or an association of the two com-

panies, except upon the terms prescribed in the granting act and it will not be presumed that the company undertook to violate the terms of its charter, or, on the other hand, to do a vain thing. Besides, the language of the deed or agreement of January 1st, 1872, is to the effect that the Northern Pacific road *when completed* was to "terminate in Duluth, Minnesota, at a point on the waters of Lake Superior, adjacent to the terminus of the said Lake Superior & Mississippi Railroad, indicating, it seems to us, that it was then the intention of the Northern Pacific Company to make Duluth the eastern terminus of the road.

Again, by the terms of the granting act it was made one of the conditions thereof, that the entire line of road be completed by July 4th, 1876. By the act of 1866, hereinbefore referred to, this time was extended for a period of two years, or to July 4th, 1878. At the termination of the period within which the road should have been built, no location of any part of the road had been made farther east than Thompson's Junction in Minnesota, and the Northern Pacific Railroad made connection with Lake Superior, its statutory eastern terminus, only over the Lake Superior & Mississippi Railroad from said Junction to Duluth in the manner hereinbefore stated. For four years after the expiration of the time limited in said grant for the completion of said road, nothing was done toward building a line from Thompson to the lake. It is hardly conceivable that the company would have subjected this grant to forfeiture through such neglect. The irresistible con

clusion is that the company then considered that the terms of its grant had been complied with in this particular, by its consolidation with the Lake Superior & Mississippi Railroad.

. Or, as stated by the Secretary of the Interior (21 L. D. 419). "By consolidation, confederation or association with another land grant railroad company, 'upon the terms named in the first section of the granting act,' that is, to make a 'continuous' railroad from Lake Superior to Puget's Sound, the Northern Pacific had complied with the terms of its charter."

"If no other cannection with Lake Superior had ever been attempted or made, and steps had been taken to forfeit the grant because of the failure to build a "continuous" road from "a point on Lake Superior," etc., it cannot be doubted that the fact of its connection with the Lake, as above stated would have been held to be a full compliance with the granting act and a complete and successful answer to any contention otherwise."

"It would seem therefore, that the company having made connection in this wise with "a point on Lake Superior, within the term required by law, it cannot now be heard to said that it did not do so; or be allowed to change its mind and establish another point as its initial point."

SECOND.

If the eastern terminus of the road was not fixed at Duluth, Minnesota, by the consolidation with the Lake

Superior & Mississippi Railroad in 1872, then it was fixed at Superior, Wisconsin in 1882, by locating and building its line to "a point" on Lake Superior at that place.

Sometime prior to April 17, 1882, the line of road was constructed from Thompson's Junction to Superior, Wisconsin. This piece of road, consisting of about twenty-five miles, was examined by commissioners appointed by the President of the United States, as provided by the granting act of July 2, 1864. Said commissioners examined said road and reported that it was constructed in compliance with the terms of said act of 1864, and on the 14th day of September, 1882, the Secretary of the Interior, transmitted said report to the President of the United States, with a recommendation that said report be approved and said road accepted by the President, according to the terms of the said granting act of July 2, the recommendations of the Secretary were approved by the President. (Transcript of Record p. 51.)

Two years elapsed before anything further was done, when on August 24, 1884, more than two years after the construction of the road to Superior City, at the western end of Lake Superior, the board of directors of the Northern Pacific Company, formally fixed upon Ashland as the initial point of road. Thereafter, the road was constructed between Ashland and Superior and a map of construction thereof filed January 20, 1885.

Superior or Superior City, was the first point at

which the Northern Pacific Railroad Company connected with Lake Superior by its own road, and it thereby became the initial point contemplated by the granting act.

In fixing a terminus and building its line to Lake Superior the Northern Pacific Railroad Company had no rights other than those contained in the granting act and the terms of the act are to be construed most strongly against the Company.

"The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

Fertilizing Company vs. Hyde Park, 97 U. S., 659.

Therefore, the right of the Northern Pacific Company, after having once affected a connection of its road with Lake Superior either by the consolidation and association with the Lake Superior & Mississippi road at Duluth or by building its own line to Superior City, to affect another and different connection under the grant, with said lake does not exist unless such right is given by the grant in clear and unambiguous terms.

Authority was given to the Northern Pacific Com-

pany to establish but one point or terminus on Lake Superior. On this point the language of Congress is plain and unambiguous. It says: "A point on Lake Superior, not "points." Here, then, is no room for construction or misconstruction, but plainly one place and one point is meant, and nothing more. For, surely, the right to construct from "a point on Lake Superior" cannot be construed as authorizing the company to lay out its road skirting for miles along the shore of the Lake, so as practically to monopolize the use of the waters and harbors thereof and the land adjacent thereto.

Prosser vs. Northern Pacific Railroad Co.,
152 U. S., 59-64.

When the location of the road to Superior City was filed and the road constructed to that point, the terms of the granting act had been fully complied with, in respect to building to "a point on Lake Superior" and the power of the company to fix another initial point was gone.

It is well settled that where authority is given a chartered company to do an act, that power is exhausted when once exercised, unless it clearly appears that it was intended the exercise thereof was to be continuous.

East Tennessee Railway Co. vs. Frazier,
139 U. S., 288.

The rule seems to be without exception that where

authority to locate a railroad is given to a company, when that location is made, the power is exhausted, and the company cannot thereafter change that location at will.

Delaware Canal Co. vs. Erie Ry. Co., 9 Paige, 328.

State vs. Norwalk Etc. Co, 10 Com. Rep.

Mason vs Brooklyn R. R. Co., 35 Barber 374.

People vs. New York & Hudson Ry. Co., 45 Barb., 73.

Van Wyck vs. Knevals, 106 U. S. 366.

Pierce on Railroads, 254-5.

And as said by Secretary Smith in 21 L. D. 421: "It is beyond credence that congress ever contemplated that after having once made the connection (with Lake Superior, at Superior City) the Northern Pacific Company should be allowed subsequently to enlarge its land grant, by skirting along the lake to other points farther east. The terms of the act were gratified when the road was constructed between a point on Lake Superior to Puget's Sound, and farther east the grant could not be extended, nor could that point be changed to another without legislative sanction."

Notwithstanding the distinction which counsel attempts to make between the case of the Atlantic & Pacific Railroad Company, (4 L. D. 458) and this case, we think the former decision is directly in point on the

claim that when a connection with Lake Superior was once affected, the right to establish an eastern terminus was exhausted and no action by the Railroad company in filing maps or building road further east, or any action of the department in accepting the same, would operate to change the terminus.

The facts in that case are as follows: By act of Congress of July 27th, 1866 (14 Stat. at Large, 292) lands were granted to this company to aid in building a railroad upon a route defined by the act as follows:

"Beginning at or near the town of Springfield in the State of Missouri, thence to the western boundary line of said state, and thence, by the most eligible railroad route, as shall be determined by said company, to a point on the Canadian river, thence to the town of Albuquerque on the river del Norte, and thence by way of the Agua Frio, or other suitable pass, to the head waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence, by the most practicable and eligible route, to the Pacific."

In 1872, 1873 and 1874 maps of definite location of sections of the route were filed which carried the definite location of the line to San Buenaventura, on the Pacific Ocean, and two other maps which carried the line northward 380 miles to San Francisco. These maps were approved, but no portion of the road from San Buenaventura to San Francisco was ever built.

We quote from the opinion by Secretary Lamar, on page 460:

"The language of the grant is: 'To the Colorado River at such point as may be determined by the company for crossing, thence by the most practicable and eligible route to the Pacific.'

"While this legislation leaves the company, with the approval of the Secretary of the Interior, to determine what is a practicable and eligible railroad route to the Pacific, it makes the Pacific, when reached, the terminus of the road; and when the Pacific was reached by a route which was selected by the company and approved by the secretary, the terminus was reached and it was beyond the power of either or both to extend the road about three hundred and eighty miles beyond the terminus fixed by law, and increase the grant of lands by the government to that extent. The same assumption of power which could justify the extending of the line in this case, after the ocean was reached could have carried it to the northern line of Washington Territory, or the southern line of California, which was certainly not the intent of the act of 1866. Hence, as there was no power in the officers of the government to thus extend the grant, after the legal terminus of the road had been reached at the Pacific Ocean, the acceptance of the maps of definite location between the points described in the rule, was without power and void."

This language would seem to be as applicable to the present case as though written concerning it.

If after the line has been located and constructed to a point on Lake Superior at Superior City, the Company can with the consent of the Interior Department extend its line and its grant along the shore of the lake seventy miles to Ashland then "the same assumption of power" could have carried it and can still carry it along the southern shore of the lake, to the boundary line of Wisconsin and Michigan and along the northern shore of the lake to the boundary line of Minnesota and Canada, which certainly was not the intent of the act of July 2, 1864.

It is stipulated in this case, that the act of Congress of May 5th, 1864, (13 Stat. 66) may be considered in evidence, and it is well to note the provisions of that statute and the proceeding under it as having relation more or less to, and somewhat explanatory of the subsequent action and present claims of the Northern Pacific Company. By Section 3, of said act, a grant of land was made to the State of Wisconsin to aid in the construction of a railroad from Portage City to Bayfield, and thence to Superior City, on Lake Superior. The entire line of this road was definitely located November 9, 1869; said location running from Portage City northwardly through Ashland to Bayfield, thence westerly to Superior City. This road, now known as the Wisconsin Central, was subsequently built from Portage to Ashland; but has not been built beyond. Between Bayfield and Superior City, the line of road, as definitely located, is about upon the same general line as the sub-

sequent definite location of the Northern Pacific Railroad between Superior and Ashland.

As the Wisconsin grant was the older by two months, if the road thereunder had been built, it would have been entitled to all the odd numbered sections within the lapping limits of the two roads, to the exclusion of the Northern Pacific. And in addition to this "so far as the routes are upon the same general line," the amount of land granted to the Wisconsin Central would in the language of the proviso to the third section of the Northern Pacific act, "be deducted from the amount granted" to that Company.

Thus the Northern Pacific would not have received any of the granted lands within the common limits, nor have been entitled to idemnity for the same; as obviously, Congress did not intend to make two land grants for roads along "the same general line."

"It is thus seen that on May 5th, 1864, Congress made a grant to Wisconsin in aid of the construction for a railroad from Ashland to Superior; and it is hardly credible that within a month thereafter, Congress made or intended to make another and larger grant to another road to secure practically the same object. Indeed, this antecedent legislation, and other considerations, strongly impress me with the belief that it was in the mind of Congress that the Northern Pacific Railroad should start from a point at the western end of Lake Superior, either in Minnesota or Wisconsin, and from nowhere else; as this would certainly be the most direct route between the termini. When it became apparent

that the Wisconsin Central did not intend to build its road farther than Ashland, the Northern Pacific's management seems to have again changed its mind and determined to reach out for a further extension to its line and grant to the eastward; its obvious purpose being to make connection with the Wisconsin Central at Ashland." (21 L. D. 412.)

MAPS.

On March 6th, 1865, Josiah Perham transmitted to the land department, what is known as the Perham Map. It is true, this map was not accepted by the department, but it is among the files and shows what must have been the intention of the Northern Pacific Company with reference to locating the eastern terminus of its road, just as clearly as though such map had been accepted. This map is an exhibit in this case as "Petitioner's Exhibit 1," and no extended description of it is necessary here. The map shows two lines running from a point in Dakota about one hundred miles west of Minnesota, one of said lines extending across Minnesota and Wisconsin to the mouth of the Montreal River, the other extending eastward to the head of Lake Superior, where a line drawn would seem to indicate an intention to locate the line in both Duluth and Superior City. Across the first mentioned line, a wavy line of erasure is drawn, indicating, if the map indicates anything, an abandonment of any proposed location of

the eastern terminus at the mouth of the Montreal River in Wisconsin, and selecting the head of the lake as the starting point. Of course, it is contended, that this map shows an alteration which must be explained before the map is admissible in evidence, and while the rule requiring explanation of patent alteration of instruments offered in evidence, is probably as contended by defendant in error, still this rule cannot overcome the presumption that the records of a public office are correct, and in this case, the presumption must obtain that the records and files of the Interior Department are the same as they were when originally made.

Further, it is claimed that the president of the Northern Pacific Company had no authority to file such map.

It will be seen from the letter of President Perham, accompanying said map, to the Secretary of the Interior, that the president states that such map is filed "under authority of the Board of Directors of the Northern Pacific Railroad Company."

There being no proof that all the actions of the said Board of Directors are contained in the minutes of the secretary of said Company, or that all the minutes are in existence, it seems to us it must be presumed that the statement in the president's letter, that he acted under the authority of the Board of Directors in filing said map is true, and that such filing was authorized.

In 1867 another map was filed by the Company. Across its face is drawn a line along the route of the road from Lake Superior to Puget's Sound, with two

initial points, one starting at Bayfield on Lake Superior in Wisconsin; the other at Superior City on Lake Superior near the western boundary of Wisconsin, both points being west of the Montreal River.

Here seems to be evidence of an abandonment of the former selection of Duluth, as the starting point and the selection of two initial points on the lake in Wisconsin In 1870 another map was filed on which the two lines of the map of 1867 from Superior City and Bayfield, and the line from Duluth and Superior City shown on the map of 1865, are both abandoned, and a single line starts from the mouth of the Montreal River, the most eastern point in Wisconsin, and runs nearly due west, crossing the Lake Superior & Mississippi Railroad at Thompson's Junction.

On this same map, or on another map filed the same day, the line in Washington Territory skirted Puget's Sound for more than two hundred miles, ending only when the international boundary was reached.

In November 1871, a map of definite location was filed, extending from Fargo to Thompson's Junction. Afterwards a map of construction of this portion of the line was filed, showing connection of the road with Duluth, as through a continuation of the same general line of route.

On July 5th, 1882, the company filed a map of definite location eastward from Thompson's Junction in Minnesota, to Bad River, Sec. 15, Township 47, Range 2, West in Wisconsin, a point about twelve miles east of

Ashland, but west of the Montreal River and *not* on Lake Superior.

Other maps were filed at different times, but the above are enough to show that while during all these years the Railway Company was assiduously filing maps and changing the eastern terminus, such action does not show that the Northern Pacific Company had any fixed or continued purpose to establish an initial point on Lake Superior at any particular place.

The Railway Company claims that "the acceptance *of the map of definite location vested the right of way and is conclusive.*"

The map was approved by the secretary not earlier than November 22nd, 1882.

Prior to April 17th, 1882, the line of road had been constructed to a point on Lake Superior at Superior City, Wisconsin, was examined by commissioners duly appointed and accepted by the President of the United States, September 16th, 1882, upon recommendation of the Secretary of the Interior. (Transcript of Record pp. 50–51.)

Now, when the line of road had been built to a point on Lake Superior at Superior City, and the same had been accepted by commissioners duly appointed in accordance with the terms of the act of July 2nd, 1864, and the report approved by the Department of the Interior and the Executive, the terms of the grant had been complied with, the terminus of the road had been established and it was simply beyond and without the power

of the Railroad company or the secretary or the president to extend the grant or change the terminus. Their acts in attempting to do so were without color of authority and were void. We have precisely the same principle of law here, as in the case of the Atlantic & Pacific (4 L. D., 458.) There, the secretary accepted the maps of definite location westward to the Pacific Ocean at San Buenaventura and thence north along the coast to San Francisco. It was contended in that case that such action was conclusive; that, in other words, the matter was *res adjudicata*.

On this point, Secretary Lamar said:

"The principle only exists when the tribunal which renders the decision has jurisdiction of or power over the subject decided. As the only power to approve maps of definite location in this case is conferred by the act of 1866 and that power only extended to the Pacific Ocean, when that terminus was reached the power was exhausted and the approval of all beyond was in excess of the authority of the departmental officers and could have no greater obligatory legal force than should have been accorded to like actions, by any other person who was not an officer of the department."

The same matter was before the Supreme Court of the United States, in The United States vs. Southern Pacific Railroad, 146 U. S., 570, where the decision of Secretary Lamar was approved in the following language:

"Subsequently, and when Mr. Justice Lamar was Secretary of the Interior, the matter was re-examined, and it was properly held that under the act of 1866, the grant to the Atlantic & Pacific was exhausted when its line reached the Pacific Ocean. San Buenaventura was, therefore, held to be the western terminus and the location of the line approved to that point.

"The fact that its line was located, and maps filed thereof in sections, is immaterial."

Defendant in error relies upon the case of Noble vs. Union River Logging Company, 147 U. S., 162, as being decisive ofthe point in question, but the difference between the cases would seem clear.

In the Noble case the statute provided:

"That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the law of any state or territory," etc.

The sole question for Secretary Vilas to determine was whether the Union Logging Company was one entitled to the benefit of such grant. The court held that he had full jurisdiction and authority to render such decision, and having made it, the department had no power to annul it

In the case at bar, the right of the department to approve a point selected by the Northern Pacific Company, as an eastern terminus, is limited by the provis-

ions of the granting act. These are plain and unambiguous.

The act says the eastern terminus shall be "a point" on Lake Superior, not any number of points.

Now, then, in 1882, the Northern Pacific Company built its road to "a point" on Lake Superior at Superior City; the same was accepted by the Secretary and President and thereupon at least, if not before, the power terminated, of the company to locate or establish any other terminus, and of the department to approve of such terminus.

The Northern Pacific Company made its connection with Lake Superior by constructing and operating its line to Superior City, and a formal declaration to that effect or to the contrary could make no difference in the fact; and having made Superior City such terminus, it was beyond the power of the company to locate another eastern terminus, and if that be so, then, certainly the department was entirely without jurisdiction when approving such terminus.

Of course, our first contention is that the eastern terminus of the road was established at Duluth in 1872 by consolidation, confederation or association with the Superior & Mississippi Railway, and if this be so, then at that time the right of the company to establish an eastern terminus was ended, and the department was thereafter without power or jurisdiction to approve any other location of a terminal point on Lake Superior.

Is the United States estopped to deny a location to Ashland?

The Northern Pacific Railway Company contends that the United States is estopped to deny a location to Ashland, and relies upon the case of United States vs. Willamette Valley, etc., Wagon Road Company. 54 Fed. Rep 807. The language of the court in this very case should seem to be a complete answer to the claim made here:

"Where the government has acted by legislative enactment, resolution or grant, or otherwise than by the unauthorized or illegal acts of its agents; and the parties dealing with the government have relied upon the same and in good faith have so changed their relations to the subject matter thereof, that it would be unequitable to declare such action or grant illegal, the government will be estopped."

The situation in this case is that the location to Ashland in 1884, and the approval thereof was not a "legislative enactment," resolution or "grant," but was an "unauthorized" act of the Northern Pacific Company and the department.

The same question was raised before Secretary Lamar in the case of the Atlantic & Pacific Railroad, 4 Land Decisions, p. 460. Among other things the secretary says:

"To the claim that the line included in the rule has

been mortgaged and money raised on its credit, it is a sufficient reply that the mortgagees could have a lien upon no greater title than the mortgagor, and if through negligence or mistake they took a mortgage upon that to which the mortgagor had no legal claim, and which reasonable diligence in the examination of the title would have shown them, the misfortune is their own and should not be borne by the nation."

In the case at bar the company's charter was the measure of its right and its provisions were disregarded and its grant exceeded with full knowledge on the part of the company of all the facts.

In the language of Secretary Smith (23 L. D., 212) "It is scarcely conceivable that Congress can ever have designed that the grant company, when it had once made its connection with Lake Superior within the terms and conditions prescribed, should afterwards be allowed to form other connections and finally designate and establish the one most advantageous to its interests and which would secure to it the largest amount of lands under its grant; or that it should be allowed to use and operate such first connections as a compliance, to that extent, with the terms of the grant, and afterwards waive such compliance and establish another connection; or that it was contemplated that the company could, under its grant, establish more than one principal point of trade and transhipment on Lake Superior."

"No such powers are given in express terms, and I do not think they are fairly inferable from any reasonable construction of the grant. And the company could

not establish such rights, or confer such powers upon itself, by resolution of its Board of Directors, or otherwise." (23 L. D., 212.)

This is a fair statement of the situation existing at the time the company was extending its line to Ashland and of which it had full cognizance. It ought not to be heard now to plead an estoppel.

For the above and foregoing reasons it is contended that the decision of the Supreme Court of the State of Wisconsin, is erroneous and should be in all things reversed.

Respectfully submitted,

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